IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 256

BILLIE SOL ESTES,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

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SUMMARY STATEMENT OF THE CASE

Petitioner, Billie Sol Estes, was charged with a felony below upon an indictment for swindling under Texas Penal Code (1925) Article 1545 (R. 1-8; Petition for Certiorari, Appendix C, pp. 53a-60a). The defendant was convicted, and sentenced to serve eight (8) years in the penitentiary (Petition for Certiorari, Appendix A, p. 1a). The statutory penalty provided is the same as the penalty for felony theft. See: Tex. P.C. (1925), Articles 1421 and 1550 (Appendix, this Brief, 46-47).

Prior to the beginning of the trial, Counsel received notice through the press that the Court intended to permit live television and radio coverage of the trial (R. 8).

Thereupon, prior to the calling of the case, defendant through his Counsel notified the Court that Counsel desired to take up with the Court certain matters before the defendant made his appearance in person. When the Court convened, certain proceedings occurred with reference to the live television and broadcast of the trial (R. 9).

The proceedings are found in the printed record (R. 30-60). Numerous photographs, which are not reproduced, are part of the record; and these illustrate the conditions in the courtroom. Defendant's objections to live television were overruled (R. 9).

The Court passed the case until October 22, 1962, because of absence of witnesses (R. 9 and 19).

On October 1, 1962, the Court without consulting defendant or his counsel issued a "press release" to Associated Press. (Release was in bold type as appears in R. 9-13).

The conditions under which the trial on the merits was televised and broadcast appear in the Bill of Exceptions No. 5 (R. 8-21).

Defendant's Counsel at the trial made personal objections to the television of the trial and to photographs in the courtroom, because those activities seriously interfered with their ability to properly represent their client, and violated their personal code of ethics. Counsel considered asking to be relieved from the necessity and duty of defending the defendant in the courtroom in that trial, but reached the conclusion that such con-

duct might be misconstrued "as an effort to obtain some personal vindication and publicity in the trial" (R. 22-23 and 64-66).

The case was tried under conditions reflected by the record, and the jury retired. Soon after retiring the jury sent in a note inquiring whether it could convict defendant of all three counts in the indictment (R. 27-29).

The issue of television coverage (petitioner's Question 2 in the Petition for Certiorari) upon which review has been granted was timely and fully presented in both the trial and appellate Texas courts (Bills of Exceptions 5, 6, and 24, R. pp. 8-29; in the Texas appellate court, R. 135; 139-143).

OPINIONS BELOW

The opinion of the Court of Criminal Appeals upon original submission is printed in the record in so far as it bears upon the issue before this Court (R. 135-137; and upon rehearing, R. 143). The Texas appellate court approved the procedure below in part as supported by "Canon XXVIII of the Canons of Judicial Ethics since [*sic*] approved by the Judicial Section of the State Bar of Texas" (R. 137).

The original opinion was rendered by the Court of Criminal Appeals January 15, 1964 (R. 135). It is a matter of public and common knowledge that Texas Judicial Canon XXVIII was adopted September 27, 1963, and that by letter dated October 21, 1963, Judge Otis T. Dunagan (trial judge in the Estes case), secretary-treasurer of the Texas Judicial Section, transmitted a copy of the new Canon XXVIII to the Texas judges (7 South Tex. Law Journal [1964], p. 212). The Texas Canon is printed in Appendix, infra, pp. 48-49.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3). The final entry of the judgment of the Texas Court of Criminal Appeals was on April 15, 1964 when that Court denied petitioner's second motion for rehearing which had been theretofore duly filed as permitted by Texas law. The Petition for Certiorari and the certified record were filed herein on July 7, 1964 within ninety days after such entry of such judgment of said state court of last resort.

CONSTITUTIONAL PROVISIONS AND STATUTES AND JUDICIAL CANONS INVOLVED

This review involves the First, Fifth, Sixth, Tenth, and Fourteenth (Sec. 1) Amendments to the Constitution of the United States; Fed. Rules of Crim. Procedure, Rule 53, 18 U.S.C.A., p. 499; Articles 1545, 1550, and 1421, Penal Code of Texas (1925); Canon 35, of the Canons of Judicial Ethics of the American Bar Association; and Canon XXVIII of the Canons of Judicial Ethics, approved by the Judicial Section of the Integrated State Bar of Texas (State Agency). These provisions are reprinted in Appendix, infra, pp. 45-49.

QUESTIONS PRESENTED

I. Does the action of a state court, over a defendant's continued objection, in requiring such defendant to submit to live television of his trial, and in refusing to adopt in an all out publicity case, as a rule of procedure, the standards as expressed by Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following Texas Canon XXVIII (adopted since the trial) of the Inte-

grated State Bar of Texas, constitute a deprivation of defendant's rights in violation of the Fourteenth Amendment?

II. Does a rule of practice required of a state court in a criminal trial, as a part of due process, in accordance with the standards recognized by Canon 35, abridge "the freedom of speech, or of the press", under the First Amendment, or deny a "public trial" under the Sixth Amendment, or conflict with any "ancient" and "established right of every citizen to attend a public trial", and to acquire knowledge, and speak, with reference thereto.

SUMMARY OF THE ARGUMENT

This case does not involve the imposition of an unconstitutional federalism upon the states. It involves procedural due process. Under the Tenth Amendment, substantive rights (not involving due process of law and equal protection of the laws) are reserved to the States.[1] But procedural matters, involving fair trial and equal protection of the laws, certainly since the adoption of the Fourteenth Amendment, are no longer matters exclusively "reserved" to the states.[2]

Canon 35 of the American Bar Association should be accepted by the Supreme Court as giving "expression to a standard which should govern the conduct of judicial proceedings". Canons of ethics adopted by bar associations do not have the effect of statutes, but are binding upon attorneys. The authority of the canons of ethics is derived, not from the fact that they are approved by a bar association, but because they are

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[1] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 79-80.

[2] *Griffin v. Illinois*, 351 U.S. 12, 16-17; *Gideon v. Wainwright*, 372 U.S. 335, 344, and 346-349.

statements of principles and rules accepted and acknowledged by reputable attorneys and are recognized and applied by the courts in proper cases.

I. There is no question of balancing the rights of the defendant and the news media. The rights of the accused should take clear priority over considerations of reporting, because the guarantees of the first amendment, in relation to the judicial branch of our government, are inscribed in order that individuals may not be unjustly condemned; and the trial procedures that have no reasonable bearing upon the determination of his innocence or guilt are matters for the determination of the defendant and his counsel.

Television and live broadcast of a trial in no reasonable manner contribute to the determination of the defendant's innocence or guilt; and his objection to such procedure is reasonably supported, upon numerous grounds, such as: (1) the disruptive effect of photographers, cameras, and microphones; (2) a man accused of an offense, but presumed to be innocent, is entitled to reasonable protection in his person and privacy, and from commercialization of the helplessness of his unhappy position; (3) live television, radio, and photography result in lawyers, witnesses, jurors, and judges "playing to the audience", and encourage a public spectacle; (4) the accused may be prejudiced by the increased public clamor resulting from television and radio coverage; (5) if education of the public is a function of criminal trials, it is incidental, and the television and radio are basically ill equipped and unsuited to conduct such educational programs, because of their limitations in reporting, and necessary distortion by broadcasting of the sensational portions of the proceedings, or selections made from biased, or a planned,

point of view; (6) because of the necessary, and desirable, irresponsibility of the American free news media, in the sense of lack of "juridical"[3] legitimacy, in arriving at an impartial determination of guilt and punishment; and (7) in so important a matter involving fair trial under the Fourteenth Amendment, a uniform rule is more desirable than separate and discretionary procedures by the several states.

Defendants are entitled to the services of adequate and effective counsel. Those things which inhibit counsel in rendering this service deny the defendant of a fair trial. In the exercise of this function, the rights and duties of counsel are supreme, and, in their proper sphere, transcend the power of the judge. An attorney exercising these functions has a right to refuse to permit the television of his client, in order to render effective service.

II. The right of the news media to gather and report a trial, and the right of the public to know, are inferior to the rights of the defendant and the state (prosecuting) to have a fair trial.

The right to obtain information and to know, as well as the right of citizens to attend public trial, are not expressly protected by the First and Sixth Amendments. It is conceded, however, that an unreasonable restriction upon obtaining information by the public would be fairly included in the abridgement of free speech, and of the press, proscribed by the First Amendment. Although the Sixth Amendment "right to a speedy and public trial" is a guarantee to the accused

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[3] "Juridical", as used here, means simply the "free press" being regarded from the legal point of view, judged by a legal standard. See: *Giorgio Del Vecchio (Campbell's Edinburgh Edition 1956), "The Problem of Justice." Introduction,* p. xiv.

alone, there is a well established right, of "ancient" origin, in every citizen to attend a public trial. But this right (of attendance) is not to be exercised in violation of the rights of the defendant to a fair trial, or to the prejudice of due and orderly procedure.

The standards of conduct as expressed by Canon 35, and in Federal Rule of Criminal Procedure No. 53, do not abridge freedom of speech, and of the press, and do not deny the right of citizens to attend public trials, but are acceptable standards in relation to First and Sixth Amendment guarantees, as demonstrated by the following:

(1) Forty-eight states of the Union now follow and enforce the standards as expressed by Canon 35;

(2) Under Rule 53 all federal courts in the United States enforce the standards as expressed by Canon 35;

(3) The extension of the standards of Canon 35 and Federal Rule 53 to Texas and Colorado state trial courts will not create an abridgement of the right to obtain information and to report such information, and to express an opinion thereon;

(4) The right to obtain information is a part of freedom of speech, which by its very nature involves acts and conduct, which must be subject to some character of regulation and control;

(5) The presence of the press and other news media reporters does not present such a psychological barrier to the ascertainment of truth as do the radio and television; and

(6) The possibility of the exercise of other suggested controls raise more serious constitutional questions as to "abridgement", and increase the danger of interference by the courts with the right to know and to speak.

ARGUMENT

I. *Due process of law includes the concept that a defendant may not be needlessly humiliated and commercially exhibited, over his objection, and required to submit to any trial procedure or technique which does not bear some fair and reasonable relation to the ascertainment of his innocence or guilt:*

1. "The truth-finding purpose of the trial, its *raison d'etre,* will have been intolerably impaired",[4] if any other criteria be accepted in a defendant's trial, than a fair determination of his innocence or guilt. The resort to the "market place" for a solution of the judicial function is unacceptable in a free country.[5] A "righteous judgment" is not to be made "according to the appearance", but it is part of man's ancient faith that he be not judged by law, "before it hear him, and know what" he has done.[6] The scientific and economic materialism of "The Great Society" cannot ignore the spiritual values in a democracy, represented by fair and equal justice to an accused. We would repudiate any suggestion that even the "right to think", and the "right to speak", transcend, or even parallel, the "right to live and to be free".[7] We would deny, in any "sense",

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[4]Quoted from *215 Atlantic* (January 1965), p. 63, Judge Kaufman (2d Cir., C.A.), *"The Uncertain Criminal Law, Rights, Wrongs, and Doubts."*

[5]Justice Frankfurter, *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 920; Justice Black (dissenting opinion), *Cox v. Louisiana* (Sup. Ct. No. 49), Jan. 18, 1965, 33 L.W. 4112, not yet otherwise reported.

[6]*Gospel of St. John,* Ch. 7, verses 24 and 51.

[7]Justice Clark in concurring in *Gideon v. Wainwright,* 372 U.S. 335, 349, points out that "liberty" is protected by due process as well as "life", and that "there may be no difference in the quality of the process" based upon a different sanction.

that the law, which measures "legal liability by moral standards", by very necessity of its nature "is continually transmuting these moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated".[8]

In Justice's Armageddon, if freedom is lost, it will profit mankind little that the loss of his liberty is heralded by the "channels" and the "networks"; nor did it profit the citizens of Poland that the last clarion of their doom, into slavery, was the voice of radio Warsaw.

It is not a question of balancing the rights of the public and the news media with the rights of the defendant. "One might as well speak of the judge in a courtroom (that is, Judge Dunagan, under the Texas Canon XXVIII) as balanced against the defendant.'"

"The institutional imperatives of federalism", Judge Kaufman says, "which had traditionally dictated deference to the states in our system of dual sovereignty, have become subordinated to the moral imperatives of the Constitution.'"[10] The public (of which the news

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Mr. Warren Freedman, of the New York Bar, in 40 Neb. Law Rev. 391, 405, in his article, *News Media Coverage of Criminal Cases and the Right to a Fair Trial*, says: "In summary, it is submitted that the rights of the accused should take clear priority over freedom of the press."

The "right to think" and "to speak", of which the "free press" is a part, are rather "means" in a democracy by which the freedom of individual citizens is "institutionalized". See, Miller (University of Texas Press, 1959) *Modern Science and Human Freedom*, pp. 146 and 208.

[8]Holmes, *The Common Law*, Lect. I, the last sentence (Boston 1938, 31st Printing), p. 38.

[9]Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper & Bros. 1948), p. 69, also pp. 67-70, replying to Mr. Chafee's suggestion of balancing.

[10]Note 4, *Ibid.*, p. 61, 62.

media are a part) has an important responsibility to share in the burden of shaping our rules of procedure, by which our civilization will be judged. And justice, which we are seeking, "is not merely the justice that one receives when his rights and duties are determined by law as it is; what we are seeking is the justice to which the law in its making should conform".[11]

The basis of due process in the Fourteenth Amendment was to implement a system of federalism in procedural fairness throughout the several states and a uniform justice for all citizens of the United States. It has been said that in "earliest literature" the idea has been advanced, "that the nature of justice is essentially social, and that its true and proper manifestations are found only where the acts and the claims of several persons meet, and its specific function is to establish between these their due limits and harmonious proportion".[12]

The fact that in this case the "mechanical monstrosities of television",[13] after the preliminary hearing before the court for continuance or change of venue, were somewhat cleaned up for the trial on the merits, is of small significance. "The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial."[14]

We have found no responsible critic who has yet argued that the television and broadcasting of court

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[11]Cardozo, *The Growth of the Law* (New Haven, 1927), p. 87.

[12]Note 3, *Ibid.*, p. 42.

[13]Arthur Krock, speaking of the National Conventions, *New York Times Service, The Austin American*, Jan. 14, 1965.

[14]*Cox v. Louisiana* (Sup. Ct. 49), January 18, 1965, 33 L.W. 4105, 4106, not yet otherwise reported.

proceedings are likely to aid and assist in the ascertainment of truth in a particular trial. On the contrary, the long experience of the legal profession and of the judiciary has demonstrated that the injection into judicial proceedings of these outside and foreign elements is likely to interfere with the search for truth. Actual showing of prejudice possibly may not be shown in some cases (though the record in this case certainly reflects it), but it is enough to condemn the practice if there is a real possibility this may be the occasional result. Federalism demands that a defendant's federal rights be violated before the Supreme Court can interfere with his state conviction; and lack of clarity in the federal constitutional standards of impartiality increases the difficulty of discerning whether or not a defendant's rights were in fact violated.[15]

The defendant, the lawyers, the state or commonwealth, the jury, even the judges, each and all are restricted by definite and positive rules of conduct. Surely, the members of the general public and the news media, non-participants in the actual trial, should and can have no greater rights.

The argument is often advanced with some surface plausibility that technological improvements in television and photography have now made the inhibitions of Canon 35 outdated; and that under ideal circumstances and with ideal equipment in the hands of the most competent technicians noiseless photography is

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[15]Since the Supreme Court does not sit to correct error in state court decisions, right of appeal based upon prejudice is a wholly inadequate method of enforcing a recognized standard of fair trial. See, *Comments, The Case Against Trial by Newspaper; Analysis and Proposal,"* 57 Northwestern Law Rev., 217, 220-221; also, 63 Michigan Law Rev., 174, 176-177.

possible (as contended by the prosecution in this case, R. 93). This is the most the media assert.[16]

But the noise and confusion are not the sole, nor even the principal objection. The psychological disturbance is nonetheless present and often is more potent and disturbing than the turbulent and noisy intrusions. "The more dangerous gases are those without odor."[17]

Profs. Paulsen and Kadish, in their text (Little Brown & Co., 1962), *Criminal Law and Its Processes*, p. 1076, say, "unfortunately much of the de-

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[16]See: Judge J. Skelly Wright, *A Judge's View: The News Media and Criminal Justice*, 50 A.B.A.J., December 1964, pp. 1125-1129, and Mr. John Charles Daly, *Ensuring Fair Trials and a Free Press: A Task for the Press and the Bar Alike*, 50 A.B.A.J., November 1964, pp. 1037-1042.

It will be noted that Judge Wright, at p. 1127 states, "initially at least, the permission of the defendant should be required before any television coverage of a trial is allowed."

Mr. Daly, pp. 1041-1042, says, "let us have an end to this nonsense that cameras and microphones make circuses of courtrooms." (i.e., Mr. Justice Douglas, speaking at the University of New Hampshire, 1960: "The trial is as much of a spectacle as if it were held in the Yankee Stadium or the Roman Coliseum"; and quoting Juvenal who wrote "Two things only the people anxiously desire—bread and circuses"; Douglas, *The Public Trial and the Free Press*, 46 A.B.A.Jour., (1960) p. 840 and Mr. Arthur Krock, supra, note 13.

[17]The quotation is from the splendid article by Hicks Epton, Esq., of the Oklahoma bar, which was published in the "Sooner Magazine," February 1960, p. 16. The assistance of Mr. Epton in preparing our Brief is acknowledged, and has been invaluable. He was one of the Counsel who succeeded in persuading the adoption on September 30, 1960, by the Supreme Court of Oklahoma, of the standards of Canon 35, for trials in that state. Mr. Epton served as a member of the A.B.A. Special Committee recommending the retention of Canon 35, which recommendation was adopted by the A.B.A., and had the unanimous commendation of the Judicial Conference of the United States. See, *Report of Special Committee*, p. 6. Mr. Epton's article was cited and quoted by Mr. Justice Douglas, in his article, Note 16, supra, 46 A.B.A.Jour., 840, 843.

fense made for the Canon and the Rule rests upon the disruptive effect of photographs, cameras and microphones in the courtroom". Other reasons, they point out, are more serious. They then outline some of the objections that petitioner has outlined in his Summary in this Brief.

These writers discuss *Lyles v. Oklahoma,* 330 P. 2d 734, and point out that in that case, after "the defendants objected to taking further pictures, the trial court ordered no further pictures to be taken" (330 Pac. 2d, at p. 738).

The defendant's right to object to television is the vital consideration that the Texas and the Colorado rules, respectively, ignore. It would seem that no defendant, properly advised, would submit to television of his trial. Guilty defendants would avoid photographing against future identification. Innocent defendants would object to its humiliation and publicity. For this reason, the two so-called discretionary states have deliberately drawn their state canons so as to circumvent the possibility of the defendant or his counsel throwing a "monkey wrench" in the "works". In Texas, to permit a defendant, or his attorney, to stand up in the courtroom "theatre", "shouting" "foul" is strictly regarded "to create a clear and present danger".

Certainly it would appear that the Texas Canon was so deliberately drawn, to bolster up the conduct of the trial Judge (secretary-treasurer of the Texas Judicial Conference) in his prior ruling in this Estes case; the trial Judge, who did not hesitate to announce that he had taken an oath to support the "Texas Constitution, not the Federal Constitution" (R. 105, second paragraph).

Such difficulties in orderly proceedings in the state courts have received official recognition. Mr. Orfield, a member of the Supreme Court committee to formulate and recommend the Federal Criminal Procedure Rules, said as to Rule 53 (formerly Rule 49, adopted 1940, effective 1945): "While the matter to which the rule refers has not been a problem in the federal courts as it has been in some state tribunals, the rule was nevertheless included with a view of giving expression to a standard which should govern the conduct of judicial proceedings.'"[18]

In the Special Committee Report, 62 A.B.A. Rep. (1937) 851, 862-865, the lawyer members of the committee believed in several provisions with reference to the rule.

They believed that "the consent of counsel for the accused in criminal cases and of counsel for both parties in civil suits should be required to be secured".

The newspaper representatives opposed this.

The lawyer members of the committee among other aspects considered that pictures of the accused, taken without his consent, and of witnesses, who are obliged to be present, often under circumstances of great emotional distress, seem to impose an unnecessary hardship upon the doing of a duty which society commands.

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[18] Orfield, 22 Texas L.R. 194; Robbins, 21 A.B.A. Jour. 301-304. See also, Report of the Special Committee on Cooperation between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings (1937) 62 A.B.A.Rep. 851, 862-865; (1932) 18 A.B.A.Jour. 762; (1926) 12 Id. 488; (1925) 11 Id. 64.

The Supreme Court has not passed upon the extent to which Canon 35, and Fed. Rule 53 (18 U.S.C.A., p. 499) give "expression to a standard which should govern the conduct of judicial proceedings". See, *Barron, Federal Practice and Procedure*, Rule Edition, 878.

It was noted that "the right of personal privacy is very little respected in America". To the entire lawyer delegation, it seemed an unjustifiable addition to the defendant's distress that he should be photographed against his will, pictured in the Press, and his personal appearance and clothes made the subject of gossiping comment. Those who desire this sort of publicity usually find some method to obtain it, while a defendant and his counsel who shrink from it can find no method of avoiding it unless their rights are respected by the Press and protected by the court. To these lawyers (among whom was the late, great advocate, Mr. Newton D. Baker) it seemed too much to hope that the lawyers and witnesses can do their full duty to the court and at the same time be effective actors in the highly specialized art of broadcast drama (Report of 1937 Committee pp. 862-864).

"The entire concept", it has been said, "of our criminal law, that a man is innocent until proven guilty beyond a reasonable doubt, is in jeopardy of being replaced by a new concept of guilt based on inquisitorial devices" (i.e. television).[10]

If the foregoing statement may be considered strong, certainly it may be said with restraint that the idea that, because a man has been suspected of a crime, or accused of one, he becomes a public character, subjecting himself to being exploited by the news media, and for educational purposes, and commercialized for the sale of soft drinks, soap, and soup (R. 84-85); and as

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[10] *Temp. L.Q.*, 70, 73, quoted by Justice Douglas in 46 A.B.A.Jour., 843. Justice Douglas adds on the same page, "One shudders to think what could be the result in trials having a political cast (as did Estes')—where the accused is unpopular, where the charge is inflammatory."

a substitute for the late (T.V.) show (R. 87); violates basic standards of fair trial.

Commercial sponsorship of such broadcasts may certainly be said to cheapen and vulgarize processes of government that should be "sacrosanct". Justice requires that in every social relation there should be presupposed an original "right to solitude". And while this may be "an ideal" concept, it is no "ideal concept" that "liberty" is essentially inborn in every man, and that each one has therefore in relation to others a "natural right" to liberty; that amongst men there is not, as regards this right, any difference, but rather a perfect equality; *"that everyone may claim from others respect for his own physical and moral integrity".*[20]

It is a trial court's duty to protect the right of an accused's privacy. The right of freedom of speech was not intended to destroy all rights of privacy and secrecy. There is no constitutional right of access, whether public or private, with the object of securing information for the purpose of printing it.[21] Neither the press nor the public are entitled to take advantage of the defendant's involuntary exposure at the bar of justice to employ photographic means to picture his plight in the toils of the law, either while in jail, going or coming from court, or while actually in the courtroom. A defendant has no remedy against false reporting of a trial by the news media, because undoubtedly there is an absolute privilege from civil or criminal libel. (*New York Times v. Sullivan,* 376 U.S. 254;

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[20]Note 3, Ibid., pp. 116 and 117.

[21]*Tribune Review Publishing Co. v. Thomas,* (U.S.D.C., W.D. Pa.) 153 F. Supp. 486, 495, affirmed 254 F.2d 883; *United Press Ass'ns v. Valente, Judge,* (Supreme Ct., N.Y. County) 120 N.Y.Supp. 642, affirmed (App. Div.) 120 N.Y. Supp. 174; 308 N.Y. 71, 123 N.E.2d 777.

271-272; *Garrison v. Louisiana*, decided November 23, 1964, No. 4-October Term, 33 L.W. 4019.)

Privacy of the accused is an important consideration. But where cameras are openly displayed in a courtroom, or a special booth is built in the rear, the courtroom becomes a theatre "set". It is the fact of photography, the fact that the intrusion is present, the fact that all the principals to the trial, judge, witnesses, lawyers, jury, are "on stage" which is inescapably distracting from the task at hand. It is the fact that these participants are made actors which is dangerous to the defendant's rights. If unwilling actors, then their essential dignity as human beings is violated. If willing actors, then those courtroom "thespians" are far more dangerous to the liberty of the accused, because their principal concern will not be compliance with their oaths, but the question of their effectiveness as actors. The manner or method of making them actors is beside the point. By the resulting spectacle, both the courtroom and the news media are degraded.

"The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself, and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become overconcerned with the impression their actions, rulings or testimony will make on the absent multitude."[11]

Canon 35, and Fed. Crim. Rule 53, and the policy expressed therein, are the outgrowth of years of thought and work by lawyers and the courts. During

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[11]Report of a special Committee of the American Bar Association (1952), of which the late great John W. Davis was the head. 77 A.B.A.Rep. 607.

the years which have followed since the close of the First World War, which gave us the radio—as the Second World War was to give us television—a series of notable cases has made lawyers and judges conscious of the growing danger to human rights in courtroom reporting. Articles in 11 A.B.A. Jour. (1925), p. 64; 12 A.B.A. Jour., (1926), p. 488; and 21 A.B.A. Jour., 301; are among the early articles expressing this concern.

The expectation and hope for self-restraint, control, and regulation by the news media itself has been discouraging. We believe it is not a harsh and unfair comment to say that the news media are wholly unable to point to an instance of reporting the trial of any famous and notorious accused in the last forty years," where the treatment has been so restrained, self-controlled, and objective, as to entitle the media to freedom from censure. The generation that has lived throughout all the years that have passed in this century recognizes in the Oswald and Ruby incidents unusual and aggravated examples, but unhappily they may not be said to be unique. The *"Warren Report"* has placed, at least, "a part of the responsibility for the unfortunate circumstances following the (late) President's death upon the news media". The report concludes: "The burden of insuring that appropriate action is taken to establish ethical standards of conduct for the news media must also be borne, how-

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"In *Cox v. Louisiana*, (Sup. Ct.) decided Jan. 18, 1965, 33 L.W. 4113, not officially reported, concurring in No. 24, Justice Black points to the history of the past 25 years demonstrating that "constitutional and statutory rights have to be protected by the courts, which must be kept free from intimidation and coercive pressures of any kind"; and Justice Clark, concurring says, "The contemporary drive for personal liberty can only be successful when conducted within the framework of due process of law" (33 L.W. 4114).

ever, by State and local governments, by the bar, and ultimately by the public. The experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial."[24]

Trial and *punishment* naturally, in limits, have a certain pedagogical and educative purpose and effect,[25] but this purpose is in no sense effectively served by live television of criminal trials. The *complacence* of the news media has, too often in state trials, been matched only by the *complaisance* of the judge.

The end in our modern planned society is not that the "Society" shall enjoy an *image* of "greatness", but that it shall bring each man and woman a measure of *good,* which individual justice alone can insure. A *"Just State"*[26] is the end, rather than a beautiful state.

"To treat trials as mere entertainment, educational or otherwise, is to deprive the court of the dignity which pertains to it and can only impede that serious quest for truth for which all judicial forums are established."[27]

"The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won

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[24]*Report Volume* (President's Commission), pp. 240 and 242.

[25]There are contrary philosophical views upon the nature of the criminal act and purposes of punishment. See; Note 8, Holmes, *"The Common Law,"* Lecture I; Del Vecchio, *"Justice"* (Campbell, Edinburgh Press, 1956), p. 2, and 183-184; Hall, *General Principles of Criminal Law,* (Second Ed. 1960), Bobbs-Merrill Co., Ch. V, pp. 146-170; and Ch. X, 325-351.

[26]Note 3, Ibid., pp. 118-119.

[27]Note 22, supra.

through the use of the meeting hall, the radio, and the newspaper.'"[28]

In the summary at the beginning of this Brief, it was stated that the "free news media" lacked responsibility[29] in judging and determining guilt and punishment for an accused. This is one of the strengths of our society, that under the protection of the First Amendment, in the forming of their opinions, the news media may not be corrected and guided. Their freedom, and that of the people, in forming and expressing their opinions, is subject to no sovereignty, other than their own conscience.

The public, however, we have said, have an important responsibility, acting through elected representatives, to share the burden in shaping the rules of criminal procedure by which our civilization will be judged. The representatives who pass the law, the executive who administers them, the judges who sit in the courts to enforce them, the court officials, the lawyers, the witnesses, the jurors, and the court reporter, all make

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[28]Frank, (Knopp, 1949) *Mr. Justice Black, The Man and His Opinions,"* p. 290.

[29]Thomas Jefferson said: "I will add that the man who never looks into a newspaper is better informed than he who reads them, inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehoods and errors. He who reads nothing will still learn the great facts, and the details are all false. Perhaps an editor might begin a reformation in some such way as this: divide his paper into four chapters, heading the first, Truths, 2nd, Probabilities, 3rd, Possibilities, 4th, Lies." *Letter of Thomas Jefferson to John Norvell,* June 11, 1807: McCormick and MacInnes, *"Versions of Censorship"* (Aldine Pub. Co., 1962), pp. 129-130.

This is not the nature of "irresponsibility" to which petitioner refers in his Brief; nor do his counsel subscribe wholeheartedly to Mr. Jefferson's castigation. However, our Democratic Founder's suggestion for "reformation" is worthy of the consideration of the media.

their contribution, respectively, to the legislative, executive, and the judicial functions, under the responsibility of which each has assumed under the sanction of his oath.

In all this, which constitutes a "just state", the news media have a part to search out information, to inform, to urge, to criticize, but they have no responsibility, nor legitimate part, in deciding, adopting, administering, and judging.

The media would be outraged indeed if their representatives at the beginning of a trial were required to stand and be sworn with the witnesses to report "the truth, and nothing but the truth", and instructed not to talk to each other, or with anyone, about the facts of the case. We can imagine their distress when such "censorship", as an Holmesian "fiend", began *griping* at the "entrials" of their cherished freedoms.[30]

The tremendous expense involved in live television in reporting trials, as demonstrated by this record, makes it impossible for television to report any, but the most noted and sensational cases; and then only portions of those.[31] Trials at best, except for those who live in the law, are more often exceedingly dull. The participants' dress and make up, as a rule, are somber and reflect a poor *image* on the screen. The ordinary lawyer's one "blue serge suit", which he reserves for court, church, weddings, and funerals, has a tendancy, as his practice progresses, to embarassingly reflect in the "kleig lights"; or at least, he thinks so. That he

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[30]Counsel use the participle of the "active" and "transitive" verb "gripe" advisedly. See, "Third New International Dictionary".

[31]Tinkham, *The Bar and Canon 35*, 19 F.R.D. 19, at p. 23; Judge Holtzoff, Presiding *Panel Discussion*, 19 F.R.D. 16, par. 3.

should have to think of those considerations, while trying his case, and have to face renewed and uxorious arguments, when he goes home wearily at night, of the necessity of a new suit, is intolerable.

In matters involving due process, or any of the first ten amendments, which may be deemed "the privileges and immunities of citizens of the United States." protected from abridgement by state law, there exists a desirability toward uniformity.[32]

The careful study by the American Bar given to the principles of Canon 35, and its overwhelming retention by the American Bar Association, and the practice in the federal courts as an absolute requirement by Criminal Rule 53, and the requirement or acceptance of these standards by forty-eight states in state trials, confirm the conclusion that such standards are unequivocally bound to fair trial and proper judicial decorum.

The dictates of federalism, in our opinion, do not "dilute, denigrate, or diminish" the quality of due process, as expressed by Canon 35, because two of the states in their trial courts permit the discretion of the court to overrule the objections of the defendant and his counsel. It makes little sense to argue that broadcasts by news media are considered inimical to a fair hearing in all federal courts, in all courts of forty-eight states, and in the appellate courts of Texas and Colorado, but they are not so inimical, if the broadcasts come from the trial courts of those two states.

It is believed that the discretionary rule of Texas and Colorado, as expressed by their respective state

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[32]"Happily, all constitutional questions are always open." See, Mr. Justice Douglas, *Gideon v. Wainwright*, 372 U.S., at p. 346. By *uniformity* is not meant *rigidity*.

canons, has not been, and will not be, properly administered so as to assure the Fourteenth Amendment's requirements of due process and equal protection of the laws in state criminal cases, nor so as to achieve those basic constitutional objectives. The overwhelming evidence is that the application of the discretionary rule of Texas Canon XXVIII,[33] with due respect to the Texas Judicial Section (of elective judges), and for the separate processes of the state, is not an appropriate adaptation of the Fourteenth Amendment to the demands of federalism. On the contrary, the application of the discretionary rule will compel continual federal review by *certiorari* and *habeas corpus* of state criminal proceedings, where the discretion has been exercised and television permitted,—not on the basis of applying a concrete, uniform principle, but by the corrosive and irritating process of case by case review.[34] It is unthinkable that in every criminal case from Texas and Colorado, and from those two states alone, where the trial court exercised its discretion and permitted television of a trial and was sustained by the highest courts of those states, the case would have to be reviewed by some federal court.[35]

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[33]i.e., Estes, Oswald, and Ruby cases. The news media in seeking through this Court's decision to remove the restraints of Canon 35 from the state courts, then the "victors" in sustaining the discretionary rule, will only become "victors busy fastening on themselves the (claimed) chains they have struck from the limbs of the vanquished" (Shaw, "Heartbreak House", Complete Plays, 1962, Vol. 1, p. 476).

[34]This is strikingly illustrated by the Supreme Court's overruling *Betts v. Brady*, 316 U.S. 455 (1942), by the opinion in *Gideon v. Wainright*, 372 U.S. 335 (1963), and the adoption of a uniform requirement of counsel in place of a discretionary rule in force in a few of the states.

[35]The burden would be aggravated because television would be used by the news media in those famous cases where the record would tend to be longer. "The very essence of a healthy

We do not believe it is necessary to "dilute, denigrate, or diminish" the quality of due process in protection of an accused from the evils of television and radio broadcast of his trial in deference to Texas and Colorado, which continue to defy what is almost universally accepted by lawyers and judges as the proprieties of criminal justice and the rights of the accused.

As the miracle of the radio and television presented itself to the world, its influence in the molding of thought to a conformity, "blueprinted" in "Madison Avenue", was early recognized by lawyers and judges, and the thinkers who mold and shape our jurisprudence. They did not act hastily, but, with no personal interests involved, commercial or otherwise, other than the "rights" which the people enjoy and the "wrongs" which the "law redresses",[36] they became imbued with "a quiet and rational persuasion"[37] that justice in our courts could not be fairly administered under the dictation and coercion of a "mass"[38] induced conformity in the public's opinion, as to an accused's innocence or guilt. From this "persuasion" a canon was formed,[39] and a rule was adopted. And the conclusions of those wise lawyers, over a half century, have been accepted by all but a few of those trained in our profession, as aiding and contributing to the attainment

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federalism depends upon avoidance of needless conflict between state and federal courts." Mr. Justice Stewart in *Elkins v. United States*, 364 U.S. 221 (1960).

[36]III Blackstone, Ch. I, pp. 1-2.

[37]DeTocqueville, *Democracy in America*, (1st Eng. Ed.), p. XXVI.

[38]Douglas, *The Public Trial and the Free Press*, 46 A.B.A. Jour., August 1960, 840, at p. 844.

[39]The original canon was adopted in 1937 as the result of that "three ring circus" known as the Hauptman trial. 19 F.R.D. 20.

of substantial justice; and have in main, proved satisfactory to both lawyers and the media.

Certainly upon the standards of Canon 35 there is far less contrariety of view among lawyers, judges, and the states than there was on the exclusion of illegal evidence[40] and upon the necessity of the appointment of counsel for indigent defendants.[41]

2. A defendant in every case is entitled to adequate counsel, and to the undivided attention and help of such counsel.[42] He requires this careful, undivided, guiding hand of counsel at every step in the proceedings against him. Without it, though the defendant be not guilty, he faces danger of conviction because he does not know how to establish his innocence.

For the attorney, the responsibility is a serious one. Few lawyers are interested in the image they cast upon a screen. Their interest is the image in which their client is cast before the court and the jury. In forming that image, as to those things not bearing on his innocence, his guilt, or his punishment, the lawyer is supreme, bound by his ethical standards, and his own integrity. "Attorneys are officers of the Court. They are members of an ancient profession whose members have the unique privilege, and corresponding responsibility, of being essentially the sole judges of the propriety of fellow members conduct."[43] The standards by which they are judged are canons of our profession. They do not prescribe. They recount,—recount the con-

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[40] *Mapp v. Ohio*, 367 U.S. 643.

[41] *Gideon v. Wainwright*, 372 U.S. 335.

[42] *Gideon v. Wainwright*, 372 U.S. 335; *Johnson v. Zerbst*, 304 U.S. 458; *Grosjean v. American Express Co.*, 297 U.S. 233, 244; *Powell v. Alabama*, 287 U.S. 45, 68, 69.

[43] Justice Greenhill in, *Dow Chemical Co. v. Benton*, (Tex. Sup.) 357 S.W.2d 565, 567.

duct of great advocates from the days of Papinian and Ulpian. Because of the manner in which they have come to us, they do not change. One does not smell one's socks to see if they need to be changed. If there is doubt, one changes them. So too, a lawyer does not judge his conduct by looking it up in the canons. If there be doubt, he makes the decision against himself. Lawyers know what conduct is proper in a trial. And lawyers know that televised and radio broadcasts from the courtroom trial are improper.

A lawyer is an instrument and agency to advance the ends of justice, and he is as independent as the judge.[44] If the television of his client's case will, in his opinion, prejudice his client's case, it is his duty to protest; and he should be entitled to object to any procedure which embarrasses, humiliates, and degrades him, according to his personal ethics, and the ethics of his profession.[45] The problem involved in Canon 35, in its depth, goes beneath any idea of a regulatory rule, to an ethical concept which does not change with the times.

That the rights of attorneys at times transcend those of the court has been recognized. Within the last few weeks it has been held by a United States Court of Appeals, sitting en banc, that a district judge may not direct and require a United States District Attorney to violate his conscience and to prepare and sign an indictment though duly returned by a grand jury.[46] Counsel for petitioner express no opinion upon the correctness of that decision, but if there be no duty

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[44]7 American Jur. 2d, *Attorneys at Law*, Sec. 3, p. 45.

[45]Testimony of counsel, R. 64-66.

[46]*United States v. Cox*, (5th Cir., en banc) decided January 26, 1965, 33 L.W. 2387.

upon the part of the Department of Justice, and a district attorney, to prepare and sign an indictment against his conscience, then surely no duty rests upon a defendant's counsel to defend, against his ethics and the ethics accepted by his fellow lawyers, and against what he believes to be right and fair.

In matters of this kind, the decision of the attorney for the defendant must necessarily be final. It cannot be left to the discretion of the judge, because it is a matter personal to the defendant. The judge cannot act as both judge and attorney for defendant. His functions are purely judicial, and he cannot effectively discharge the obligations of counsel for accused (See, *Powell v. Alabama,* note 31, supra).

Mr. Sean Mac Bride, Secretary-General of the International Commission of Jurists, an association of 40,000 judges, lawyers, and law professors of more than sixty non-Communist countries, said recently: "Lawyers have a sacred duty to preserve the physical, moral and intellectual integrity of human beings."[47] Freedom of counsel to conduct his client's defense, and to make decisions for his client, free from the dictation of the court, are essential if attorneys are to stand like Erskine, unafraid before the bench, confident in their duty to their client, and the Law of the Land.

In early law "notorious criminals" were not allowed advocates,[48] and the progress of our law from the *Institutes* to *Gideon* has been the brightest guide light of man toward a more civilized soci v.

II. *A rule of practice in accordance with the stand-*

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[47] *85 Time,* January 15, 1965, p. 41.

[48] Cooper's *Justinian* (1812 Ed.), Notes, p. 598.

ards expressed in Canon 35 does not abridge "freedom of speech, or of the press", or deny a "public trial".

It is thought that no responsible authority, either judicial or from the news media, has ever sought to question this "larger scope" of the right to a fair trial over the First and Sixth Amendment guarantees. "The rights at issue are, on the one hand, the right to a fair trial and, on the other, the public's right to know." "When the public's right to know extends to opinions or observations that could be prejudicial to a fair trial, it is no longer a right but a wrong."[49] Though the view here expressed has been called "remarkable", and even "asinine" by news media,[50] the considered consensus, both of informed lawyers and publicists, is that between "fair trial" and "free press" there is no problem of "balancing", because a trial is not held to furnish material and information for the news media to report, but "free news media" exist, as one of their purposes, to insure due process in a trial, and to conduct their news gathering activities in such a manner as not to endanger a fair trial.

The hazard presented by television of executive and

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[49] *The Wall Street Journal, Editorial, "Standards for the Courts,"* August 14, 1964; Walter Lippman, *The Public Philosophy*, p. 20; *Shepherd v. Florida*, 341 U.S. 53; *In re Hearings Concerning Canons of Judicial Ethics*, 132 Colo. 591, 296 P.2d 465, 467; address of Lewis F. Powell, Jr., President of the American Bar Association, *"The Right of a Fair Trial"*, at Houston (reported in full in *The Austin American*, December 22, 1965, p. 4); and see, Freedman, *News Media Coverage of Criminal Cases and the Right to a Fair Trial*, 40 Neb. Law Rev., 391, at p. 405.

[50] *The Austin American*, January 6, 1965, p. 4; and *Editor and Publisher*, "the newspaper world's foremost trade magazine", quoted in *The Austin American Editorial*, p. 4, sixth paragraph.

administrative interviews has been pointed out by a leading Washington correspondent.[51]

If this Court is to resolve any supposed conflict between "freedom of speech and of the press", and the due process protected by the Fourteenth Amendment, the purposes of the two protective provisions must be considered, and not the one provision alone.[52] This involves the nature of "free speech", and the meaning of "abridge".[53]

In the days just before the adoption of the first ten

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[51]Mr. Leslie Carpenter, under a Washington by-line, recently wrote, as to Presidential news conferences: "Also television moved in, and that compounded difficulties. It stirred the hams and the kooks of the trade to new lengths to get in a question and get on camera." *The Austin American-Statesman*, February 14, 1965.

Regrettably, if we understand the meaning of the word "kook", and we think we do, we must confess that a profession, too, has its "hams and kooks."

[52]*United States v. Classic*, 313 U.S. 299, 317-318.

[53]Efforts to rationalize freedom of speech have been attempted by many thinkers. In Germany the great Rudolf von Jhering in his "Confidential Letters" held that free speech was "derivative of the individual's right of property in his means of speech—freedom of the tongue." For example, "when you scratch yourself, you exercise a property right." Seagle, *"Men of Law From Hummurabi to Holmes"*, (Macmillan 1948), p. 319 (Quaere: May it be exercised in public, or standing up in a theatre?) Compare Professor Meiklejohn's property theory, pp. 58-60.

Mr. Charles L. Black says: "It is not to give a 'preferred position' to one right over another, but to note that one right is, as a substantive matter, of an altogether larger scope than another." *The People and the Court*, p. 221.

Judge Holtzoff (D.C.D.C.), presiding over *Panel Discussion*, 19 F.R.D. 17, at p. 18, par. 1.

Justice Black recently repeated his views on balancing: "I have previously had a number of occasions to dissent from judgments of this Court balancing away the First Amendment's unequivocally guaranteed rights of free speech, press, assembly and petition"; dissenting in *City of El Paso v. Simmons*, (No. 38) decided January 18, 1965, 33 L.W. 4126, at p. 4132.

amendments there were some who did not join with George Mason in his apprehensions over the adoption of the Constitution. In the original constitution "free speech" was not mentioned.[54] Between Justice Holmes[55] and Professor Meiklejohn, and "clear and present" danger, we have conflicts of views, but they have no bearing on this case. As we understand the law, both Professor Meiklejohn and Professor Chafee, and all teachers and authorities, agree[56] that there are times at which men may not speak, and when they may not insist upon obtaining information.

"Free speech" is identical with "free press" and includes all character of human communication,[57] and it includes "utterances" and "acts" to obtain information. "We, (may often) find exaggeration in the

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[54]In the Federalist, No. LXXXIV, Hamilton said: "What signifies a declaration, that 'the liberty of press shall be inviolably preserved?' What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."

[55]It seems significant that, having fostered "clear and present danger" upon our law in *Schenck v. United States*, 249 U.S. 47, 52, Justice Holmes, neither in *Abrams v. United States*, 250 U.S. 616, 624-631,—nor seldom later,—was able to discover the presence of "a clear and present danger"; nor is there any record that he ever caught a man who stood up, "falsely shouting fire in a theatre".

[56]Meiklejohn, *Free Speech and Its Relation to Government*, p. 22; Chafee, *Free Speech in the United States*, reprinted in McCormick and MacInnes, *Versions of Censorship*, (Aldine 1962), p. 172; Charles L. Black, Jr., *The People and the Court*, (Macmillan 1960), p. 217-218; Mr. Justice Black, on "fair trial," *Gideon v. Wainwright*, 372 U.S. 335, at p. 344; and Justice Harlan, the "front-line responsibility" on the state courts "for the enforcement of constitutional rights", *ibid.*, p. 351.

[57]*Thomas v. Collins*, 323 U.S. 516.

conclusion that the utterance even 'tended' to interfere with justice.'"[80] But with television in the courtroom the problem does not involve "utterance", it involves the exercise of that part of "free speech" which includes acts and finding out what to talk about."

There is splendid authority holding that the First Amendment guarantee is freedom "to speak", and that it does not prohibit "abridgment" of the right to obtain information.[80]

Counsel are unwilling to accept a construction of the first amendment guarantees which includes only the right to speak, and not the correlative right "to know". Of the English people it has been said, "with Milton that they desired the liberty to know, to utter and to argue freely, according to conscience, above all liberties".[81]

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[80]Frank, *Mr. Justice Black, "The Man and His Opinions,"* (Knopf 1949), p. 249; *Bridges v. California*, 314 U.S. 252 (1941). Perhaps the people's concept of the whole field of rights prescribed by the first ten and the fourteenth amendments tends to exaggeration. In Samuel Butler's words they (the people) would be equally horrified to hear (them)—doubted or to see (them) practiced," quoted by Mr. Yale Kamisar, 78 Harvard Law Rev., p. 490.

[80]*Grosjean v. American Press Co.*, 297 U.S. 233, 243.

[80]*The Tribune Review Pub. Co. v. Thomas*, (3rd Cir.) 254 F.2d 883, affirming 153 F.Supp. 486; *United States v. Kleinman*, 107 F.Supp. 407 (1952); *United Press Ass'n v. Valente, Judge*, 308 N.Y. 71, affirming 120 N.Y.S. 174, and 120 N.Y.S. 642; *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74, 114 S.E.2d 421 (1960), certiorari denied, 364 U.S. 290, despite petitioner's claim that severe curtailment of the press and a substantial blackout of news-gathering would result; and *Ex parte Sturm*, 152 Md. 112, 136 Atl. 312, (1927); Jones, *Congress and Television, A Dissenting Opinion*, 37 A.B.A. Jour., 392 (1951).

[81]Judge Allen (Second Cir.), *Fair Trial and Free Press*, 19 F.R.D. 15, at p. 37. There is nothing in Milton's Defense of the English People, nor in Judge Allen's splendid article, which may be construed as placing the liberty to "know" and

These dangers to fair trial, which the news media seem to apprehend in enforcement of the standards of Canon 35, seem unrealistic. We have been told by the press that crime in state offenses has been on the increase;[42] particularly has this been claimed by the Attorney General of Texas at his recent State Conference on Crime, where the opinions of this Court (i.e. *Stanford v. Texas*, No. 40, decided January 18, 1965, 33 L.W. 4140, pending on State's Petition for Rehearing) were awarded substantial blame. But this has not been the experience in the federal courts, where Canon 35 is enforced absolutely by Criminal Rule 53.[43]

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to "speak" above the right to "life", and to "liberty" *itself*. At page 42 Judge Allen said: "Television is not merely communication. It is a communication plus vivid photography plus the theatre. Freedom of the Press was never intended to give such multiple distraction entree to a court. Televising trials destroys the right of privacy for all considered, for defendants, litigants, and witnesses." The rustication of counsel's classical education has indicated little possibility of edification in reexamining Milton's Treatise in the original, which as we remember was written in Latin.

A contrary view to Judge Allen is expressed by Mr. J. R. Wiggins, Managing Editor (1955) of the Washington Post and Times Herald, who said: "It seems to me unreasonable and illogical to suppose that any citizen, in consequence of his being accused of a crime, should thereby acquire the right to close a court and thus deprive citizens not accused of any wrongdoing, of their rights." Mr. Wiggin's argument is certainly "reasonable" and "logical" if indeed criminal courts *perform* for the purpose of protecting and insuring "rights" "of citizens not accused of wrongdoing", to be educated and entertained.

[42]"Criminal Justice," 85 Time, January 8, 1965, p. 43, quoting Justice Bell and Musmanno, of the Supreme Court of Pennsylvania speaking at the meeting of the Philadelphia Bar Association, voting a rule of "self-silence" and "no comment."

[43]"It is noteworthy that federal criminal case filings do not reflect any crime wave." Chief Justice Warren, *Address to The American Law Institute*, May 20, 1964, 35 F.R.D. 181, at p. 184. "It is heartening" the Chief Justice said, "to be able to report that Congress and the Executive Branch, as

No one has ever suggested in any authorities that any practice be accepted which proscribes the reporting of the evidence as it is introduced before the jury by the state and defendant during the course of a trial. There should be little conflict between news media and attorneys for the accused, if each but exercises some will to recognize that fair trial in criminal prosecutions and freedom of the news media rest under no irreconciliable constitutional "incompatibility".

All citizens are members of the public, and they enjoy rights both as individuals and members of the public. The right of a citizen "not accused of a crime" to attend and know what progresses at the trial is "diluted" and measured by the parallel right of every citizen as a member of the same public. By natural laws it suffers diminution in the common "aggregate" (in the sense used by Jefferson). But the right of an accused to a fair trial is individual, and is personal to him alone, and to the sovereignty which is charging him. The rights of such individual and such sovereignty are not diluted, and suffer no diminution, but stand first among the rights of man to "life" and "liberty" and the right of the sovereignty to secure redress of "public wrongs". Governments are in the nature of "social compacts", that men and women may more fully attain that "life" and "liberty". All other rights have sprung from the "social man's" desire to more fully enjoy that "life" and that "liberty"; rather than

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well as the courts, are taking appropriate action to make criminal trials fairer as well as faster." 35 F.R.D. 181, at p. 188, par. 2.

"*State v. Van Duyne*, N. J. Sup. Ct., decided November 16, 1964, opinion summarized 33 L.W. 2259. It will be pointed out *infra* that a resort to Canon 20, of the American Bar Association, alone can offer no solution to the problem.

to be forced to seek protection from a *one man* who is the strongest.

In *Hudson v. State*, 132 S.E.2d 508 (1963), the Court holds that " 'No freedoms are absolute'." The freedom of speech and press are not exceptions." That court holds that "if at any time the representatives of the 'press' in any field of activity interfere with the orderly conduct of court procedure, or create distractions interfering therewith, the court has an inherent power to put an immediate stop to such conduct"; and that it was the duty of the court to keep the courtroom free of distractions which might tend to hamper the proper conduct of the trial, and to see that the conditions surrounding the trial are not prejudicial to the accused.

In that case (as in our Estes case, R. 49, where the media's expert conceded the possibility of the directional microphone picking up what was said at the counsel table) the record showed that the microphone was within five feet of counsel's table, and the appellate court took "cognizance of the fact that the accused and her counsel would be apprehensive" that the microphone would be sensitive enough to pick up even whispered conversations between them. The case is important as being the only one found by counsel which deals directly with the possible interception by the news media of confidences between counsel and accused.

United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.

"Counsel for petitioner believe, as held by Goethe in Germany and Coleridge in England, that man *does* bear allegiance beyond knowledge to those things he accepts without proof as good. In that sense there are *absolutes*. Man has a right to *live;* he has a right to *think;* he has a right to *speak;* he has a right to *labor;* and he has a right to *rest*; and to borrow a phrase made famous by a great Texan, "in that order".

2d 777, and the opinions in the lower courts; *Geise v. United States*, (9th Cir.) 265 F.2d 658, 669; *The Tribune Review Publishing Co. v. Thomas*, (3rd Cir.) 254 F.2d 883, and the opinion in the district court; and *United States v. Kleinman*, (D.C.D.C.) 107 F.Supp. 407; are splendid cases. But Counsel for petitioner do not rest their position upon some of the conclusions intimated in those cases. We believe the right to "know" and to "find out" information regarding a criminal case is part of the first amendment guarantee of "free speech". Otherwise speech would be mere gossip or "title-tattle".

We do not subscribe entirely to what is said by those cases as to the Sixth Amendment guarantee of a "public trial". Concededly the amendment does provide that "the accused shall enjoy the right to—a public trial". But in our opinion a strong case is made by Judge Froessel (New York Court of Appeals) concurred in by Judge Dye, that "the right of the public to attend a criminal trial—stems from the deep roots of the common law".[66]

The wonders of television present a problem to serious students of our criminal jurisprudence. "Our great

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[66]Counsel respect the opinions of such eminent authority as Judge Skelley Wright (C.A.D.C.), 50 A.B.A.Jour., 1125-1129; doubts expressed by Judge Alexander Holtzoff (D.C.D.C.); opinions express by Judges Froessel and Dye (Court of Appeal, N.Y.); by Judges Bell and Musmanno (of Pennsylvania) and former Attorney General Brownell, 35 Neb. L. Rev. 1 and such eminent representatives of the news media as Mr. John Charles Daly, 50 A.B.A.Jour., 1037-1042; and Mr. J. R. Wiggins, 19 F.R.D. 25-36. Counsel, themselves, are unwilling to ignore the extent to which *Grosjean v. American Express Co.*, 297 U.S. 233 (1935); and *Re Oliver*, 333 U.S. 257 (1947), bear upon the sanctity of "freedom of speech" and "public trial." See, also, *Recent Cases Notes*, 67 Harvard Law Rev., 334-346; 68 Harvard Law Rev., p. 1406; and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

problem today and for the future is to domesticate scientific knack and technique so that they may operate compatibly with the values and assumptions of a legal order and, at the same time, make their important contributions to our needs."[67]

We believe the value of news broadcast may be exercised by conventional reporting, in the manner followed by the "press", without exposing the courtroom live to the camera, and without distracting from the job at hand; i.e. the determination in a court trial, according to legal standards and safeguards, of the "innocence" or "guilt" of the accused; and if found "guilty", the determination of his punishment. Complete prevention of the opportunity to report a criminal trial would "amount to an infringement of the First Amendment guarantees".[68]

The freedoms guaranteed by the First Amendment are substantially identical. "Congress may make no law", (a) "respecting an establishment of religion, or prohibiting the free exercise thereof"; (b) "or abridging the freedom of speech, or of the press". *No law shall be made. No religion may be established. Freedom of speech, or of the press, may not be abridged.* It sounds simple, but as Alexander Hamilton warned, it has been made complicated.

The matter as to religion was approached in a case which has been a landmark of First Amendment rights.[69] We learned that a religion could not be "es-

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[67]Francis A. Allen, *The Borderland of Criminal Justice*, (U. Chicago Press, 1964). *First Essay Proposition.*

[68]68 Harvard Law Rev. 1393, at p. 1405; citing *Dennis v. United States*, 341 U.S. 494, 542 (1951) (concurring opinion of Justice Frankfurter.)

[69]*Cantwell v. Connecticut*, 316 U.S. 276 (Jehovah Witness case).

tablished", and that the free exercise thereof could not be "prohibited"; but the "exercise" of a religion involved acts, and that acts could be brought into conformity with the demands of a society in order to preserve the enforcement of the protection of those rights.

"Since we are committed to a government of laws and not of men, it is of utmost importance that the administration of justice be absolutely fair and orderly." The Supreme Court "has recognized that the unhindered and untrammeled function of our courts is part of the very foundation of our constitutional democracy."[10] "A State", we are told, "may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence." "Liberty can only be exercised in a system of law which safeguards order." No Justice of this Court disagreed with those statements of Justice Goldberg, speaking for the Court. Mr. Justice Black, dissenting in No. 49, was even more emphatic in his statement of the principle: "The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures."

The use of television in photographing a trial, over the defendants objection, could have no place in such "calmness and solemnity of the courtroom according to legal procedure".

Mr. Justice Clark said, concurring with Justice Black: "The contemporary drive for personal liberty

[10]Mr. Justice Goldberg, *Cox v. Louisiana*, (No. 49 October Term), decided January 18, 1965, 33 L.W. 4105, 4106. This Court was there speaking of "right of speech," and "right of petition."

can only be successful when conducted within the framework of due process of law."

The exclusion of the television camera from the courtroom during a trial does not even approach the denial of any First Amendment guarantee, even under its broadest interpretation.

If the media's position is accepted, as to freedom to obtain information, then a trial court could not proceed until television and its score of agents and assistants announced ready. This was true in Tyler; just as in Dallas, Oswald could not be transferred to the county jail until the newspapers were notified, and the cameras,—as well as his assassin,—were ready. Rule 42 of this Court would be an abridgement, because it prevents the representatives of the media from presenting their Briefs in support of their position in this Estes case, without the consent of the petitioner.

By the adoption by the State Judicial Conference of its Canon 32, Illinois became the thirtieth state which legally placed in effect the American Bar Association Canon 35.[71] Informed authority furnishes the information that only two states remain where, as a matter of practice, television in court during trials is permitted,—that is in Texas and Colorado.[72] It is thought that no appellate court in Texas or Colorado as a matter of practice permits photographing of its proceeding, except upon exceptional ceremonial occa-

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[71]1964 Annual Report of the Illinois Judicial Conference, (Burdette Smith Co., Chicago, Illinois), pp. 168-170; 48 Jour. of the American Judicature Society, September 1964, p. 80.

[72]Epton, *A Lawyer's Views*, Sooner Magazine, Feb. 1960, p. 17; *Report of American Bar Association's Special Committee on Canon 35*

sions."[73] It has never been seriously advanced that such almost universal rule has resulted in any abridgement of free speech, or violation of the public's right or desire to avail itself of the opportunities offered by a public trial.

All federal courts under Rule 53 prohibit photography as a matter of uniform law. It is not believed that the further extension of the standards of the Canon and the Rule to the trial courts of the two remaining states can have any but a minimal effect upon "speech", the right to "know", or the right of the public to attend "public trials".

The right to "obtain information", like the First Amendment right to "exercise" ones religion, by its very nature involves acts and conduct which must be subject to some character of control. Reporters, commentators, columnists, editors, and journalists, despite the reference to the newspapers by one of their *own*, heretofore noted, as a "trade", are members of an ancient profession. Certainly no member of any other class contributed more to the liberty our founders won, than the journalist and the lawyer. If it was the voice of a "Henry" who flung the challenge, it was the pen of a "Paine" who applied the spark, of freedom.

Neither the presence of the members of the press, nor of the commentator, who will later broadcast his news, present the psychological barriers to ascertainment of truth, as does the presence of the television and radio transmitter. It is basic in our form of government that a record shall be kept of public proceed-

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[73] If there are any exceptions to this, they have not been called to counsel's attention.

ings.[74] Canon 35 and Rule 53, by prescribing a uniform rule, maintain the balance and fair and equal treatment between the media. Only a news reporting interest which also owned or dominated a television medium could possibly complain of such "fair and equal" treatment.

Many means of obtaining an approach to ideal reporting of criminal trials have been suggested, and apparently there is only one effective alternative,—some very strong action from the Supreme Court. "It appears that the Supreme Court (despite its inclination toward "judicial restraint") is, possibly, "slowly", "moving toward the strong action needed to prevent the (news media) from becoming a powerful instrument of injustice".[75]

Inter-professional codes,[76] themselves, smack of censorship, because they are adopted without responsible representatives of the public participating. Enforcement rigidly of the A.B.A. Canon 20 has met the vigorous outcry of the media, and even eminent Judges.[77]

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[74]"Each House (of the Congress) shall keep a Journal of its Proceedings, and from time to time publish the same, except such Parts as may in their Judgment require Secrecy." *Constitution*, Art. 1, Sec. 5.

[75]Notes and Comments, 16 Okla. Law Rev. 350. Hope of enforcement by elected officials offers but dobutful promise. Two early astute foreign visitors to America have quoted an even shrewder *Yankee*, Jared Sparks, as commenting upon the American Press, and its responsibility for its excess, to the effect: "If it is against private individuals, these complain, and the papers are sued in the courts; but if it is against public officers, the latter never complain; they would have the right (long before *Sullivan* and *Garrison*) but never make use of it." Pierson, *Tocqueville and Beaumont in America*, (Oxford Press, N.Y. 1938), at pp. 399-400.

[76]*Criminal Justice and Ethics Projects"*, 10 A.B.A. News, January 15, 1965, at p. 4.

[77]*Gag Rule Pushed by Bar*, The Austin American, January 6, 1965, Editorials attacking Philadelphia Bar Association's so called "guidelines".

Instructions to the jury to disregard the presence of the cameras and microphones and the possible hundreds of thousands of persons who may be listening are considered largely to be a "farce", even an aggravation.[78] Controlling the camera and news media by contempt, aside from the question of constitutionality,[79] certainly has the effect of censorship, and factually is difficult to defend; and in America, if not in England, any type of censorship clashes with the concept of our basic freedoms.[80]

The adoption of the standards of Canon 35 for trials seems the most promising method of meeting the hazards of the cameras, television and broadcasting, of any other suggested;[81] and involves no significant abridgement of speech.

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[78]The fact that there have been few instances of acquittals under such instructions has indicated that Mark Twain's "little boy" has not yet been able "to stand in the corner and not to think of a white elephant". See, Judge Frank in *Leviton v. United States*, (2d Cir.) 193 F.2d 848, cert. den. 343 U.S. 946. Jurors may disregard cautionary instructions. See, *The Case Against Trial by Newspaper*, 57 Northwestern University Law Rev. 217, at p. 234.

[79]*Bridges v. California*, 314 U.S. 252 (1941).

[80]Sullivan, *Contempts By Publications*, pp. 47-54, 77-86, 98-102.

[81]"If the Bar Association of America can state a code of ethics covering publicity of trials, which are (*sic*) sensible and which do (*sic*) not violate decent practices of free publication, and if they will discipline the members of their own profession to abide by that code, they will be met more than half way—by the great majority of newspapers." *Editorial, Toledo News-Bee*, January 18, 1936. This challenge was met in the adoption of Canon 35. 20 J. Am. Jud. Soc'y 82, 83 (1936). See also, 57 N.W.U. Law Rev. 217, 237.

CONCLUSION

As has been said, the Supreme Court has not passed upon, nor determined, the extent to which Canon 35 and Rule 53 give "expression to a standard which should govern the conduct of judicial proceedings". This is an important question, to lawyers, judges, our courts, persons accused of crime, and to the news media, in Texas.

But to this defendant it is important because he suffered the humiliation of the media's exposure of his trial over the objections of himself and of his counsel, and he was convicted of an offense, of which he says he is "not guilty". He was entitled to a presumption of innocence until he should be legally and fairly convicted. If he was unfairly treated by the court's permitting television, either in matters before the court alone, or before the jury, then he has been unfairly convicted, and is entitled, still, to the presumption of innocence.

For the Courts, the question present is a new one, and there is no direct controlling authority, and petitioner has had to predicate his Brief upon expressions of informed scholars in the law, and by analogy. Counsel for petitioner make no claim to originality of expression in this Brief, nor even to the form and plan of the argument. Claim is made, only, to an untiring,—and rewarding at least to them,—effort in organizing and presenting from a mass of sources the petitioner's position.

We have had the benefit of aid and counsel of many legal thinkers. In all of the more recent cases cited, we have had the benefit of the briefs of counsel in those cases. We have used all this aid and information free-

ly, and we acknowledge the aid of all, in forming the arguments, and even the wording in places, which this Court will not fail to recognize.

For the reasons stated, this case should be reversed, and this Court should set as a rule of fair procedure, in all criminal trials, the standards as expressed by Judicial Canon 35 of the American Bar Association.

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APPENDIX

Constitution and Statutes

The Constitution of the United States:

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT [X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Criminal Procedure:

Rule 53. *Regulation of Conduct in the Court Room*

The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.

Title 17, Chapter 8, Article 1421. Texas Penal Code 1925:

Art. 1421. *Punishment for felony theft*

Theft of property of the value of fifty dollars or over shall be punished by confinement in the penitentiary not less than two nor more than ten years.

Title 17, Chapter 15, Article 1545. Texas Penal Code 1925:

Art. 1545. *"Swindling" defined*

"Swindling" is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the right of the party justly entitled to the same.

Title 17, Chapter 16, Article 1550. Texas Penal Code 1925:

Art. 1550. *Punishment for swindling*

Every person guilty of swindling shall be punished in the same manner as is provided for the punishment of theft, according to the amount of the money or the value of the property or instrument of writing so fraudulently acquired.

Canons of Judicial Ethics. American Bar Association:

Judicial Canon 35. *Improper publicizing of Court proceedings*

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract *participants and*

witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

Canons of Judicial Ethics, Integrated State Bar of Texas:

Judicial Canon 28. *Improper publicizing of Court proceedings*

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

In connection with the control of such coverage the following declaration of principles is adopted:

(1) There should be no use of flash bulbs or other artificial lighting.

(2) No witness, over his expressed objection, should be photographed, his voice broadcast or be televised.

(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.

(4) Any violation of the Courts' Rules shall be punished as a contempt.

(5) Where a judge has refused to allow coverage, or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt.